JUDGMENT OF THE COURT
4 October 1991 *

In Case C-246/89,

Commission of the European Communities, represented by Robert Fischer, Legal Adviser, and Peter Oliver, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, also a member of its Legal Service, Centre Wagner, Kirchberg,

applicant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director-General for Community Legal and Institutional Coordination, and by Rosario Silva de Lapuerta, Abogado del Estado, Head of the Legal Department for Matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4 and 6 Boulevard Emmanuel Servais,

intervener,

v

United Kingdom of Great Britain and Northern Ireland, represented by T. J. G. Pratt, Principal Assistant Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell QC, Solicitor General, Christopher Bellamy QC, Christopher Vajda, Barrister-at-Law, and Andrew Macnab, Barrister-at-Law, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

supported by

* Language of the case: English.

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, Senior Counsel at the Bar of Ireland, with an address for service at the Irish Embassy, 28 Route d'Arlon,

intervener,

APPLICATION for a declaration that, by imposing the nationality requirements enshrined in sections 13 and 14 of the Merchant Shipping Act 1988, the United Kingdom has infringed Articles 7, 52 and 221 of the EEC Treaty,

THE COURT,

composed of: G. F. Mancini, President of Chamber, acting as President, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco (Presidents of Chamber), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: J. Mischo,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing the oral argument presented by the parties at the hearing on 17 January 1991,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 August 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by imposing the nationality requirements enshrined in sections 13 and 14 of the Merchant Shipping Act 1988 (hereinafter referred to as 'the 1988 Act'), the United Kingdom had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty.

2 Section 13(1) of the 1988 Act provides for the establishment of a new register of British fishing vessels in which may be registered those fishing vessels which fulfil the conditions laid down in section 14 of that Act. Section 13(2) in substance excludes the registration of fishing vessels in any other British register; however, section 13(3) extends, for a transitional period, the validity of existing registrations pending registration in the new register.

3 The 1988 Act entered into force on 1 December 1988 and the transitional period referred to in section 13(3) expired on 31 March 1989.

4 Section 14(1) of the 1988 Act provides that, except where the Secretary of State for Transport decides otherwise, a fishing vessel is to be eligible to be registered in the register only if:

'(a) the vessel is British-owned;

(b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and

(c) any charterer, manager or operator of the vessel is a qualified person or company'.

According to paragraph (2) of the same section, a fishing vessel is deemed to be British-owned if the legal title to the vessel is vested wholly in one or more qualified persons or companies and if the vessel is beneficially owned by one or more qualified companies or as to not less than 75% of the property therein by one or more qualified persons; according to section 14(7) 'qualified person' means a person who is a British citizen resident and domiciled in the United Kingdom and 'qualified company' means a company incorporated in the United Kingdom and having its principal place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

5 Since it considered that the nationality requirements laid down by the 1988 Act infringe Articles 7, 52 and 221 of the Treaty, the Commission initiated proceedings under Article 169 of the EEC Treaty against the United Kingdom.

6 By two orders of 4 October 1989, the Court granted leave to the Kingdom of Spain to intervene in support of the form of order sought by the Commission and to Ireland to intervene in support of the form of order sought by the United Kingdom.

7 On 10 October 1989, the President of the Court granted an application by the Commission for an interim order requiring the United Kingdom to suspend the application of the nationality requirements enshrined in the 1988 Act (246/89 R [1989] ECR 3125). In pursuance of that order and pending judgment in the main proceedings, the United Kingdom issued an Order amending section 14 of the 1988 Act with effect from 2 November 1989.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 According to the Commission, the requirements enshrined in the 1988 Act relating to the nationality of owners and operators of British fishing vessels and to the nationality of shareholders and directors of companies owning, chartering or operating such fishing vessels constitute discrimination on grounds of nationality. They are as such prohibited by the general rule contained in Article 7, as well as by the more specific provisions of Articles 52 and 221 of the EEC Treaty.

The competence of the Member States to lay down nationality requirements for vessels

10 The United Kingdom contends in the first place that the EEC Treaty cannot be interpreted so as to deprive the Member States of their competence to determine the nationality of their vessels, including conditions relating to the nationality of owners.

11 It must be pointed out, in the first place, as the Court held in its judgment in Case C-221/89 *Factortame II* [(1991] ECR I-3905, paragraph 13), that, as Community law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States. As far as fishing vessels in particular are concerned, the provisions of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 L 20, p. 19) refer to fishing vessels 'flying the flag' of a Member State or 'registered' there but leaves those terms to be defined in the legislation of the Member States (judgments in *Factortame II*, above, paragraph 13, and in Case 223/86 *Pesca Valentia* [1988] ECR 83, paragraph 13).

12 Nevertheless, powers retained by the Member States must be exercised consistently with Community law (see most recently the judgments in Case 57/86 *Hellenic Republic* v *Commission* [1988] ECR 2855, at paragraph 9, and in Case 127/87 *Commission* v *Hellenic Republic* [1988] ECR 3333, at paragraph 7).

13 The United Kingdom argues, however, that the position is different when it comes to the competence of each State under public international law to define as it

thinks fit the conditions upon which it grants to a vessel the right to fly its flag. It refers in that connection to Article 5(1) of the Geneva Convention of 29 April 1958 on the High Seas (United Nations Treaty Series 450, No 6465), which reads as follows:

'Each State shall fix the conditions for the grant of nationality to ships, for the registration of ships in its territory and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'

14 That argument might have some merit only if the requirements laid down by Community law with regard to the exercise by the Member States of the powers which they retain with regard to the registration of vessels conflicted with the rules of international law.

15 Consequently, it must be held that, as Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of Community law.

16 The question therefore arises whether the nationality requirements at issue are compatible with the rules of Community law and more particularly with Articles 7, 52 and 221 of the Treaty.

The compatibility of the nationality requirement at issue with Articles 7, 52 and 221 of the EEC Treaty.

Article 7 of the Treaty

17 It must be borne in mind that the Court has consistently held (see, for example, judgment in Case 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461, paragraph 13) that Article 7 applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination.

18 In the same judgment (paragraph 12) the Court made it clear that the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented by Article 52 of the Treaty in the specific domain governed by that article and that, consequently, any rules incompatible with the latter provision are also incompatible with Article 7 of the Treaty.

Article 52 of the Treaty

19 As to Article 52 of the EEC Treaty, the Commission states that the refusal to register as British fishing vessels boats owned, chartered, managed or operated by nationals of other Member States, whether natural or legal persons, deprives those nationals of their right to establish themselves in the United Kingdom in order to pursue their fishing activities there under the same conditions as nationals of the United Kingdom. Moreover, the nationality requirements applicable to the shareholders and directors of companies deprive those same foreign nationals of the right to set up, and act as directors of, companies in the sea-fisheries sector in the United Kingdom. Finally, those same requirements also restrict the possibility for companies of other Member States, within the meaning of Article 58, to pursue sea fishing activities from the United Kingdom through agencies, branches or subsidiaries.

20 At the hearing, the Commission claimed that the registration of a vessel constituted in itself an act of establishment within the meaning of Article 52 et seq. of the Treaty and that therefore the rules on freedom of establishment were applicable.

21 It must be observed in that regard that the concept of establishment, within the meaning of Article 52 et seq. of the Treaty, involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.

22 Consequently, the registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the Member State concerned.

23 However, where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment.

24 It follows that conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Article 52 et seq. of the Treaty.

25 However, the United Kingdom contends that the registration of a vessel in a Member State is not a *conditio sine qua non* of establishment in that State, since natural persons or companies wishing to do so are not precluded from operating vessels, even fishing vessels, for instance from the United Kingdom, in the context of operations linked to its territory; establishment in the United Kingdom in that way would be possible in respect of any vessel registered in one of the other Member States.

26 That argument cannot be upheld. According to the second paragraph of Article 52 of the Treaty, freedom of establishment includes, in the case of the nationals of a

Member State, 'the right to take up and pursue activities as self-employed persons . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected . . . '.

27 The United Kingdom considers that the Treaty does not preclude nationality requirements of the type at issue, because discrimination on grounds of nationality can arise only where, under the legislation of a Member State, persons are treated differently on account of their different nationality. In contrast, in this case, what is involved is not discriminatory treatment on grounds of nationality but conditions for the grant of nationality and, in that domain, the Member States are free to determine to whom they will grant or refuse their nationality, in the case of natural persons and ships alike.

28 In that connection, it must be observed that the concept of 'nationality' of ships, which are not persons, is different from that of the 'nationality' of natural persons.

29 The prohibition of discrimination on grounds of nationality which is set out in particular, as regards the right of establishment, in Article 52 of the Treaty, is concerned with differences in treatment as between natural persons who are nationals of Member States and as between companies that are treated in the same way as such persons by virtue of Article 58.

30 Consequently, in exercising its powers for the purpose of defining the conditions for the grant of its 'nationality' to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality.

31 It follows from the foregoing that the contested nationality requirements, according to which natural persons who own or charter a vessel and, in the case of a company, its shareholders and directors, must have British nationality in order to enable a vessel to be registered in the British register of fishing vessels, are contrary to Article 52 of the Treaty.

Article 221 of the Treaty

32 According to the Commission, the British conditions at issue, in so far as they relate to the control of 'qualified' companies, discriminate against nationals of other Member States wishing to purchase shares in companies owning, chartering, managing or operating British fishing vessels and are therefore contrary to Article 221 of the Treaty.

33 It must be stated that the contested nationality requirements, in so far as they relate to the control of companies, are contrary to Article 221 of the Treaty, which imposes on the Member States the obligation to accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58.

The possibility of justifying the contested nationality requirements by reference to the common fisheries policy and more particularly the quota system

34 The United Kingdom considers that the nationality requirements introduced by the 1988 Act are justified by the present Community rules on fishing. Those rules, although establishing a common system, are based on a principle of nationality for the purpose of the allocation of fishing quotas. Pursuant to Article 5(2) of Council Regulation No 170/83, cited above, it is for the Member States to determine the detailed rules for the utilization of the quotas allocated to them and therefore to lay down the conditions which the vessels authorized to fish for such quotas must satisfy.

35 It must be observed in the first place that, in its judgments in Case C-3/87 *Agegate* [1989] ECR 4459 and Case C-216/87 *Jaderow* [1989] ECR 4509, the Court stated that, when exercising the power granted to them to define the detailed rules for the utilization of their quotas, the Member States may determine which vessels in their fishing fleets will be allowed to fish against their national quotas, provided that the criteria employed are compatible with Community law. In the second judgment cited above, the Court held in particular that a Member State was

entitled to lay down conditions designed to ensure that the vessel has a real economic link with that State if that link concerns only the relations between that vessel's fishing operations and the populations dependent on fisheries and related industries.

36 It should next be observed that the purpose of the national legislation at issue concerning the registration of vessels is not to define detailed rules for the utilization of quotas. Consequently, whatever the objectives pursued by the national legislature, that legislation cannot be justified by the existence of the Community system of national quotas.

37 The United Kingdom also contends that if any national of a Member State was entitled to register his boat in another Member State and, consequently, benefit from the fishing rights enjoyed by the nationals of the latter Member State, that would undermine the regime applicable to certain regions particularly dependent upon fishing and industries allied thereto, referred to in Annex VII to the 1976 Hague Resolution ('the Hague Preferences'), the regime applicable to fishing in coastal zones, the carefully balanced mechanisms set out in Articles 156 to 166 and 346 to 353 of the 1985 Act of Accession and the efforts made by the Member States with regard to the restructuring of their fishing fleets pursuant to the Community's multiannual programmes.

38 In that connection, it need merely be pointed out that the regimes referred to by the United Kingdom are not based on the nationality of persons and cannot therefore provide any justification for a derogation, in relation to the registration of fishing vessels, from the prohibition of all discrimination on grounds of nationality.

39 It follows from all the foregoing considerations that, by imposing as conditions for registration of a fishing vessel in its national register the requirements that the owners (the legal owners and, as to not less than 75%, the beneficial owners,

where the latter are natural persons), charterers and operators of the vessel must be British nationals or companies incorporated in the United Kingdom and that, in the latter case, not less than 75% of the capital of any such company must be held by British nationals or by companies fulfilling the same conditions and that 75% of the directors of any such company must be British nationals, the United Kingdom has failed to fulfil the obligations incumbent upon it under Articles 7, 52 and 221 of the EEC Treaty.

Costs

40 Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the United Kingdom has failed in its submissions, it must be ordered to pay the costs of the Commission, including those of the proceedings on the application for interim measures, and those of the Kingdom of Spain. Ireland must bear its own costs, including those incurred by it in the proceedings on the application for interim measures.

On those grounds,

THE COURT

hereby:

1. **Declares that, by imposing as conditions for registration of a fishing vessel in its national register the requirements that the owners (the legal owners and, as to not less than 75%, the beneficial owners, where the latter are natural persons), charterers and operators of the vessel must be British nationals or companies incorporated in the United Kingdom and that, in the latter case, no less than 75% of the capital of any such company must be held by British nationals or by companies fulfilling the same conditions and that 75% of the directors of any**

such company must be British nationals, the United Kingdom has failed to fulfil the obligations incumbent upon it under Articles 7, 52 and 221 of the EEC Treaty;

2. **Orders the United Kingdom to pay the Commission's costs, including those of the proceedings on the application for interim measures, and those of the Kingdom of Spain;**

3. **Orders Ireland to bear its own costs, including those of the proceedings on the application for interim measures.**

Mancini O'Higgins Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Slynn Kakouris

Joliet Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 4 October 1991.

J.-G. Giraud
Registrar

G. F. Mancini
President of Chamber,
acting as President